UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOUGLAS EMMETT MANAGEMENT, LLC **Employer** **and** **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501** **Petitioner**	**CASE 31-RC-217994**

OPPOSITION TO REQUEST FOR REVIEW

COMES NOW Employer Douglas Emmett Management, LLC ("Douglas Emmett" or "Company") and, pursuant to Section 102.67(f) of the National Labor Relations Board's Rules and Regulations, files this Opposition to the Petitioner's Request for Review of the Decision and Direction of Election issued by the Regional Director for Region 31 ("the DDE") on May 17, 2018. The Petitioner's disjointed Request for Review identifies no cognizable basis for Review under Section 102.67(d), rests on a foundation of overturned Board precedent, and provides only a smattering of mischaracterized references to the factual record. Meanwhile, the Region's thorough and well-reasoned DDE explains the extensive factual support for its determinations that the petitioned-for unit must include the Company's Chief Engineers and Preventative Maintenance Engineers ("PMTs") under current Board law. As a result, the Board must deny the Petitioner's Request for Review.

I. Statement of the Case

The Company owns and operates approximately 18 million square feet of office space and 3,320 apartment units in Los Angeles County. In support of its maintenance operations, the Company employs approximately 80 building engineers to perform heating, ventilation, air conditioning (HVAC), plumbing, lighting, machine repair, equipment installations, locksmithing, and other engineering duties.

On April 6, 2018, the Petitioner filed the Petition in the instant matter, seeking to represent "all full-time, salaried, regular and part-time, temporary or extra maintenance engineers employed by the employer[] at the 3 Douglass (sic) Emmett buildings referenced in 2b" under Section 9 of the National Labor Relations Act (the "Act" or "NLRA"). 29 U.S.C. § 159. The Petitioner identified the buildings located at 15760 Ventura Blvd. ("Terrace") and 15821 Ventura Blvd. ("Gateway") in Encino, California (collectively, "the buildings") in its attachment. The Company owns and operates both buildings.

Eight of the Company's building engineers perform work at the petitioned-for buildings. A Chief Engineer, Apprentice Engineer, and Utility Engineer work at the Terrace building, another Chief Engineer and Utility Engineer work at Gateway, and three PMTs work at both buildings. Petitioner, however, adopted the position that the petitioned-for unit includes only three employees: the two Utility Engineers and the Apprentice Engineer. The Region conducted a hearing on April 17 and 18, 2018, during which the parties presented evidence regarding three issues:

(1) Whether the Chief Engineers are supervisors within the meaning of Section 2(11) of the Act;

(2) Whether the petitioned-for unit of Utility Engineers and Apprentice Engineers share a community of interest sufficiently distinct from the Chief Engineers to warrant a separate appropriate unit under *PCC Structurals*, 365 NLRB No. 160, slip op. at 7 (Dec. 15, 2017); and

(3) Whether the petitioned-for unit of Utility Engineers and Apprentice Engineers also share a community of interest sufficiently distinct from the Preventative Maintenance Engineers (PMTs) to warrant a separate appropriate unit under *PCC Structurals, Inc*.

(DDE 2).[1]

The DDE correctly finds Chief Engineers do not perform any Section 2(11) supervisory functions, and neither Chief Engineers nor PMTs share a sufficiently distinct community of interest from Utility and Apprentice Engineers. Consequently, it directs a May 30, 2018 election including all engineers working at the two buildings. In response, on May 24, 2018, the Petitioner filed three meritless blocking charges, falsely alleging Company representatives made various isolated and non-coercive statements to employees.[2] Petitioner maintains these charges to date, and has thus prevented the employees from exercising their right to vote.

Most recently, Petitioner filed the instant Request for Review on June 14, 2018. As discussed in further detail below, the Request for Review fails to clearly identify or explain any cognizable reasons for the Board to grant Review. Nonetheless, the Request for Review leaves no doubt that the Board must deny the Request.

II. The Request for Review Identifies No Discernible Reason for Review

The Company sympathizes with the Board's task of interpreting the Petitioner's Request for Review. Nowhere in the document's 16 pages does Petitioner clearly explain what perceived errors it cites as the basis for Review, except that it *seems* to suggest the DDE should have applied the discarded standard of *Specialty Healthcare & Rehab Ctr. of Mobile*, 357 NLRB 934

[1] This Opposition to Request for Review utilizes the following citation conventions: (DDE __) refers to page numbers of the May 17, 2018 Decision and Direction of Election; and (RFR __) refers to page numbers of Petitioner's Request for Review.

[2] For example, the first charge (31-CA-220911), alleges the Company: "chastised an employee for wearing a union pocket protector."

(2011), *enf. sub nom, Kindred Nursing Centers E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) to community of interest issues. The Request for Review also fails to provide any connections between any purported errors and the grounds for Review specified in the Board's Rules and Regulations.

Section 102.67(d) of the Rules explains that the "Board will grant a request for review only where compelling reasons exist therefor[,]" and on at least one of the following grounds:

> (1) That a substantial question of law or policy is raised because of:
>
> (i) The absence of; or
>
> (ii) A departure from, officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.
>
> 29 C.F.R. § 102.67(d).

Rule 102.67(e) requires the party requesting Review to provide a "summary of all evidence or rulings bearing on the [Rule 102.67(d)] issues." 29 C.F.R. § 102.67(e).

Here, the only clue Petitioner offers as to the reasons it seeks Review states:

> The [Petitioner] requests review based on subsections (d)(1), (d)(2), and (d)(4). Pursuant to subsection (d)(2), the [Petitioner] has summarized the pertinent facts above and will discuss each ruling below.
>
> (RFR 9).

Nothing above or below this passage, however, answers critical questions such as:

- What aspect of the DDE 'departs from Board precedent?'
- Which factual decision or decisions are 'clearly erroneous?'

- What Board Rule or policy should it reconsider, and what are the 'compelling reasons' to do so?

The Request for Review's "Introduction" provides no assistance in this regard. The Introduction discusses two unrelated unfair labor practices before another Region, a decertification petition, refusal to execute a collective-bargaining agreement, and requests for findings by an Administrative Law Judge (RFR 1-2). Beyond not relating to the current matter, they do not even relate to the employer at issue. An apparent typographical error such as this typically would not affect the merits of a Request for Review. Here, though, Petitioner's failure to adequately explain its arguments elsewhere mean this mistake materially compounds the Company's and the Board's difficulties in ascertaining the purported grounds for Review.

The Request for Review asks the Board to guess which of Petitioner's disconnected "square peg" arguments belong in which "round hole" allowed by the Rules. This approach cannot provide the "compelling reasons" necessary for the Board to grant Review under Section 102.67(d).

III. Chief Engineers Do Not Perform Any of the Section 2(11) Functions Discussed in the Request for Review

Citing a 1967 Fifth Circuit case, the Request for Review describes "[t]he task of identifying supervisor (sic) as an 'aging but…persistently vexing problem." (RFR 9) (citing *NLI v. Security Guard Serv.*, 384 F.2d 143, 145 (5th Cir. 1967). The Request for Review's arguments confirm Petitioner is quite vexed indeed.

A. Chief Engineers Do Not Assign or Direct Other Engineers.

As an initial matter, the Request for Review argues only that "The Chief Engineer Has *The Ability To* Assign and Direct[.]" (RFR 11) (emphasis added). This argument fails as a matter of law. The Board requires "evidence of actual supervisory authority visibly

demonstrated by tangible examples to establish the existence of such authority." *Building Contractors Association*, 364 NLRB No. 74, slip op. at *12 (Aug. 16, 2016) (quoting *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971)). Consequently, "the ability to" perform a supervisory duty does not suffice in the absence of tangible examples of actual performance. Here, Petitioner provided no such tangible examples.

Instead, the Request for Review points only to the generalized ability of Chief Engineers to prioritize resolution of tenants' work orders (RFR 2–3; 11–12). For example, in the only record citation contained anywhere in its "Legal Argument" section, the Request for Review points to testimony regarding the ability to "evaluate and prioritize in effectively resolving *resident's complaints*." (RFR 11–12) (emphasis added). As the DDE points out, Petitioner presented no evidence that Chief Engineers "consider employees' individual skills and abilities, which is required to find the exercise of independent judgment." (DDE 11) (citing *SR-73 and Lakeside Avenue Operations LLC*, 365 NLRB No. 119, slip op. at 1 (Aug. 17, 2017). In other words, prioritization of residents' complaints does not equate to independent judgement in the direction or assignment of engineers.

Furthermore, with respect to "responsible" direction, Petition offered no specific evidence that the Company holds Chief Engineers accountable for other engineers' performance failures. (DDE 11) (quoting *Rockspring Development, Inc.* 353 NLRB 1041, 1042 (2009) ("vague testimony about possible consequences will not suffice").

The Request for Review concludes its assignment/responsible direction argument by stating:

> [Two engineers] both testified that the chief engineer assigns them duties on a routine basis. However, despite the obvious credibility issues with [the Company's witnesses], the Regional Director seemed to believe [them] more than the engineers.

(RFR 12).

Petitioner does not explain what purported "obvious credibility issues" reflect upon assignment or responsible direction. More importantly, however, the Regional Director did not "believe" any witness more or less than any other witness. The DDE contains no credibility resolutions. Instead, the DDE properly finds Petitioner failed to present specific and tangible evidence supporting its claims of assignment and responsible direction. Absent such evidence, the Board must reject Petitioner's assertion of supervisory status.

B. Chief Engineers Do Not Discipline or Recommend Discipline.

As with assignment and responsible direction, Petitioner's baseline argument regarding discipline fails as a matter of law. It argues, "The Chief Engineer Has *The Ability To* Discipline Or Recommend Discipline." (RFR 12) (emphasis added). Even if taken as true, which it is not, this assertion cannot establish supervisory status because the theoretical "ability to" discipline employees does not suffice. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047–48 (2003) (rejecting claim of supervisory status based on "[b]are testimony to the effect" that individual possessed authority to discipline).

Petitioner rests its discipline arguments on precisely the same assertions considered and properly rejected by the DDE. (*Compare* RFR 12 *with* DDE 9–10). While acknowledging, "[t]here is no dispute that the chief engineers do not issue discipline directly," Petitioner points to "their role in performing quality control." (RFR 12). That role, as explained by Petitioner itself,

amounts only to "reporting work as substandard" and participation in the performance evaluation process. (*Id*).

The DDE correctly dispenses with these arguments. It explains, "the authority to . . . point out deficiencies in the job performance of other employees does not establish the authority to discipline." (DDE 10) (quoting *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002)). Furthermore, "when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." (DDE 9) (quoting *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1334 (2000)).

Additionally, as pointed out by the DDE but ignored in the Request for Review, Petitioner presented no evidence whatsoever that Chief Engineers can exercise any disciplinary authority using independent judgment. (DDE 10). To the contrary, Property Manager Karen Totah independently investigates all reports of misconduct. (*Id*.). The Request for Review also concedes, "that management may after investigating the matter issue discipline." (RFR 12). Such investigations by upper management preclude the exercise of independent judgment by the reporting employee. *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 7 (2016) (citing *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007)). Consequently, the Request for Review's arguments regarding discipline provide no basis to overturn the DDE's decision on supervisory status.

C. Chief Engineers Do Not Hire Other Engineers.

Once again, Petitioner frames the issue in a manner that precludes establishment of a supervisory function. It argues, "The Chief Engineer Is Instrumental In Hiring New Engineers." (RFR 13). Even incorrectly assuming *arguendo* that Chief Engineers play an "instrumental" role in the hiring process, such activities would not suffice to establish supervisory status. *Ryder*

Truck Rental, Inc., 326 NLRB 1386, 1388 (1998) (rejecting hiring contention even where putative supervisor's recommendations received "significant" weight).

As the DDE correctly concludes, Petitioner relied on mere "paper authority" supporting its contention that Chief Engineers hire other Engineers (DDE 6–7) (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)). The Request for Review attempts similarly unavailing tactics. For example, without pointing to any *actual* hiring duties performed by Chief Engineers, it speculates that they must participate in hiring because Property Manager Totah lacks engineering experience. (RFR 13). The Request for Review's only other argument rests on an unidentified individual purportedly telling an Apprentice Engineer, then working in a non-unit day porter position, "if [a Chief Engineer] liked his performance, he may be promoted." (*Id.*). Such evidence falls far short of the Board's requirements for hiring duties. *See Detroit College of Business*, 296 NLRB 318, 319 (1989) (explaining that putative supervisors must "actually perform the hiring function, in that they interview and determine which applicants to hire"); *North General Hospital*, 314 NLRB 14, 16 (1994) ("[m]ere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish Section 2(11) supervisory authority").

The absence of any viable evidence of actual participation in the hiring process removes any possibility that Petitioner could establish supervisory status on that basis.

D. Secondary Indicia Cannot Independently Form the Basis of Supervisory Status.

The Request for Review concludes its misguided foray into Section 2(11) functions by attempting to artificially inflate the statutory criteria. It first criticizes the DDE for "citing to the wrong page number" for the proposition that "secondary indicia are insufficient to establish supervisory status." (RFR 14; in reference to DDE 12 (citing "*Golden Crest Healthcare Center*, 348 NLRB at 731, fn. 10")). In fact, footnote 10 of *Golden Crest* is on page 73**0**, rather than

page 73**1**. This minor transcription error in the DDE, though, stands as a mere footnote in the Request for Review's own parade of missteps.

Much more importantly, the *Golden Crest* Board and the DDE correctly state that a party cannot establish supervisory status through secondary indicia alone. Well-established Board precedent contradicts Petitioner's argument to the contrary. *See, e.g.*, *K.G. Knitting Mills*, 320 NLRB 374 (1995) (reversing, where no primary indicia were present, finding of supervisory status based solely on fact individual had key to factory, opened facility in the morning, "watche[d] everything" before the manager arrived, and dealt with trucks arriving at plant).

The only truly incorrect citation on this issue arises from the Request for Review's reliance on *Pacific Beach Corp.*, 344 NLRB 1160, 1161 (2005), which unequivocally states, in reversing a finding of supervisory status: "The Board has held, however, that secondary indicia should not be considered in the absence of at least one characteristic of supervisory status enumerated in Section 2(11)."

Petitioner gains nothing by attacking the DDE for a minor typographical mistake, then immediately claiming another case stands for the opposite proposition held. In any event, Board law clearly prevents Petitioner from establishing supervisory status on secondary indicia grounds. Petitioner failed to satisfy its burden to prove 2(11) status and secondary indicia provides no saving grace.

IV. The Request for Review's Only Discernible Argument Regarding the DDE's Community of Interest Determinations Relies on Overturned Board Law

The Request for Review's community of interest component represents the most perplexing element of a document rife with confounding approaches. The DDE provides highly detailed and well-analyzed explanations of the factual and legal reasons why neither Chief Engineers nor PMTs share a sufficiently separate and distinct community of interest from the

remainder of the unit (DDE 12–27). Specifically, the DDE methodically examines each relevant factor in the community of interest analysis for each group. (*Id*.).

In response, the Request for Review's "Statement of Facts" contains only two short paragraphs (totaling 8 lines of text) describing the lack of familiarity with PMT duties held by a particular Utility Engineer and an Apprentice Engineer. (RFR 3, 4). Subsequently, its "Legal Argument" section provides an exposition of various standards related to community of interest analysis, but offers no attempt whatsoever to apply the facts of this case to any legal standards. (RFR 14–16). Instead, it argues only that the DDE failed to apply the two-step burden-shifting and "overwhelming community of interest" standards of *Specialty Healthcare*. The Request for Review does not cite, nor even acknowledge, the Board's decision in *PCC Structurals* to overturn *Specialty Healthcare*. (RFR 15–16). The Board cannot grant a Request for Review based on the DDE's failure to adhere to inapplicable standards.

This odd approach presents many more questions than answers. Is Petitioner simply unaware of *Specialty Healthcare*'s demise? Does it advocate a return to *Specialty Healthcare*? If so, why does it fail to advance any policy or legal arguments in support of that standard? And, perhaps most importantly: which community of interest factors and evidence, under *any* standard, does Petitioner rely upon in challenging the DDE?

Fortunately, not all mysteries need be solved. Regardless of what objectives or arguments Petitioner may intend to advance, Rule 102.67(e) requires a "self-contained document enabling the Board to rule on the basis of its contents[.]" 29 C.F.R. § 102.67(e). The contents of the Request for Review here can only result in rejection of its community of interest position.

V. Conclusion

For the reasons set forth above, the Board must deny Petitioner's Request for Review in the instant matter.

Respectfully submitted this 21st day of June, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of June 2018, the foregoing, **OPPOSITION TO REQUEST FOR REVIEW**, was filed via electronic filing with:

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